04-55752

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTOPHER C. EDWARDS,

Petitioner-Appellee ,

v.

A.A. LAMARQUE, Warden ,

Respondent-Appellant .

On Appeal from the United States District Court
for the Central District of California
No. CV 01-10401-RGK
The Honorable R. Gary Klausner , Judge

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Respondent-Appellee ("Respondent") hereby respectfully petitions this Court for rehearing pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and suggests that the Court rehear this case en banc pursuant to Rule 35 of the Federal Rules of Appellate Procedure.

Rehearing or rehearing en banc should be granted because the panel's December 12, 2005 published opinion involves a question of exceptional importance; specifically, whether 28 U.S.C. § 2254 allows a federal habeas corpus court to reject the presumption of correctness for state-court fact-finding, and

condemn a state-court adjudication as an unreasonable determination of the facts, where a rational fact-finder could have determined the facts as the state court did.[1/]

INTRODUCTION AND STATEMENT OF COUNSEL

Over a well-reasoned dissent, a majority of the panel affirmed the district court's judgment granting the Petition for Writ of Habeas Corpus on the grounds that Petitioner received ineffective assistance of trial counsel, in violation of the Sixth Amendment. The majority determined that the state courts unreasonably found that Petitioner's trial attorney made a reasonable tactical decision in asking questions of Petitioner during direct examination at the first trial which resulted in Petitioner providing answers that waived the marital communications privilege. (Slip. op., at 16158-66.)

As more fully discussed below, rehearing or rehearing en banc should be granted because the state court record provided ample support for the finding that Petitioner's trial attorney made a reasonable tactical decision regarding the questions he asked Petitioner during the first trial. Therefore, the Anti-Terrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") precludes relief based on Petitioner's ineffective-assistance-of-trial-counsel claim.

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1. A copy of the panel's opinion is attached hereto as Exhibit A.

ARGUMENT

REHEARING OR REHEARING EN BANC SHOULD BE GRANTED BECAUSE THE MAJORITY'S DECISION INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE REGARDING THE SCOPE OF FEDERAL HABEAS COURT REVIEW OF STATE COURT DETERMINATIONS AND FACTUAL FINDINGS

Rehearing or rehearing en banc should be granted in this case because the state court record provided ample rational support for the finding that Petitioner's trial attorney made a reasonable tactical decision regarding the questions he asked Petitioner during the first trial.

Even before the enactment of AEDPA, the Supreme Court recognized that Congress had left little room for a federal habeas corpus court to reject state-court findings of fact, such as whether a trial attorney made a tactical decision at trial, especially when the findings are based on the credibility of witnesses observed by the state court. *See Wright v. West*, 505 U.S. 277, 286-91 (1992) (plurality op.) (discussing history); *Marshall v. Lonberger*, 459 U.S. 422, 431, 437-38 (1982); *Sumner v. Mata*, 449 U.S. 539, 598 (1981). Under 28 U.S.C. section 2254, as amended by AEDPA, the federal court may not re-weigh the state-court evidence and grant relief on a claim if any rational fact-finder could have resolved the factual issues as the state court did. Here, the state court record - including the statement of trial counsel who explained that he made a mistake but was found

lacking in credibility by the trial court judge who observed trial counsel's conduct and demeanor - provided ample support for the state court's determination that the trial attorney made a reasonable tactical decision regarding the questions asked of Petitioner during direct examination at the first trial. Consequently, the majority erred under section 2254, as amended by AEDPA, by drawing different inferences from the same record and finding that the state court unreasonably found trial counsel was not ineffective.

A. The Scope Of Federal Habeas Court Review Under AEDPA

The purpose of AEDPA's habeas corpus reforms was to place "more, rather than fewer, limits on the power of federal court" to grant habeas corpus relief. *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003); *Woodford v. Garceau*, 538 U.S. 202, 206 (2003); *Duncan v. Walker*, 533 U.S. 167, 178 (2001). AEDPA's reforms in section 2254(d) and section 2254(e) have strengthened the preclusive effect of state-court factual determinations so that they bind the federal court unless the state record provides no rational support for the findings and "clear and convincing evidence" compels the conclusion that the state-court's findings were wrong.

In enacting AEDPA, Congress demonstrated its confidence in the state courts and enhanced the state courts' primary role in adjudicating federal

constitutional claims arising out of state criminal trials. For example, section 2254(e)(2) elevated the role of the state courts by precluding federal-court evidentiary hearings, except in rare instances, "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings."

Most pertinent here, Congress' AEDPA reforms have strengthened the preclusive effect of factual determinations made in the state courts where the prime responsibility for factual development is channeled. *See* 28 U.S.C. § 2254(d)(2) ("An application for a writ of habeas corpus . . . shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings."). In addition, AEDPA has strengthened the statutory presumption of correctness for state-court factual determinations. *See* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct," and that "[t]he applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence"). Section 2254(d)(2) and section 2254(e)(1) work in similar ways in a case in which the habeas corpus applicant, seeking no federal evidentiary hearing to present new evidence of an alleged "clear and convincing" nature, merely seeks

to second-guess the weight of the evidence upon which the state court relied in resolving the facts underlying his federal claim. Where applicable, section 2254(d)(2) outright precludes claims based on fact disputes if the evidence presented in the State court proceedings provides a minimum level of reasonable support for the state court's findings. In light of the AEDPA-enhanced effect of the "presumption of correctness" afforded to state-court fact-finding, section 2254(e)(1) similarly provides no means of overcoming rational state court fact findings by a petitioner who relies on the state record and fails to properly present the federal court with cognizable new "clear and convincing" evidence to disprove those findings. Whether applied separately or together, section 2254(d)(2) and section 2254(e)(1) compel rejection of Petitioner's ineffective-assistance-of-trial-counsel claim in this case.

B. Section 2254(d)(2) Precludes Relief On A Challenge To The Factual Basis Of A State Court's Merits Adjudicaion If The State Court Record Would Have Allowed A Rational Fact-Finder To Determine The Facts As The State Court Did

Section 2254(d)(1) is a threshold provision that presumptively precludes habeas corpus relief entirely - it says "relief shall not be granted" - for claims adjudicated on their merits in the state court. Section 2254(d)(2) deals specifically with collateral attacks founded on disputes about the facts on the basis of the state

record - i.e., the precise kind of claim Petitioner has raised in this case. It applies in the case at bar, for the state court adjudicated Petitioner's claim on the merits. Section 2254(d)(2) also states a standard naturally amenable to retrospective review of an extant body of evidence. Thus, section 2254(d)(2) allows Petitioner to avoid the outright bar on relief, and to then proceed to possible further inquiry into his ineffective assistance claim, only if the state adjudication was based on an "unreasonable determination of the facts in light of the evidence presented in the state court proceedings." *See Miller-el v. Dretke*, 125 S. Ct. 2317, 2325, 2340, 162 L. Ed. 2d 196 (2005). The "unreasonable determination" standard of section 2254(d)(2) defines an inquiry into whether any rational fact-finder could have found the facts as the state court did.

The section 2254(d)(2) standard of heightened deference equates with the habeas corpus "any rational trier of fact" standard described in *Jackson v. Virginia*, 443 U.S. 307 (1979). As with section 2254(d)(2), the *Jackson* test is an inquiry into reasonableness. *See id.* at 325. Under *Jackson*, the question on review is whether "no rational trier of fact could have found" the pertinent fact, under the applicable standard of proof, in light of the record produced at the trial. *Id.* at 324.

Review for reasonableness or rationality inquires whether any "substantial evidence" supported the trier of fact's determination. *Jackson*, 443 U.S. at 318-19 & n.12. The reviewing court does not "weigh the evidence" or "determine the credibility of witnesses." *Glasser v. United States*, 315 U.S. 60, 79 (1942); *cf. Schlup v. Delo*, 513 U.S. 298, 330 (1995) ("under *Jackson*, the assessment of the credibility of witnesses is generally beyond the scope of review"). It views the record in the light most favorable to the determination of the fact-finder and presumes in support of it the existence of every fact that reasonably may be deduced from the evidence. *Jackson*, 443 U.S. at 325.

Where the state court has adjudicated the petitioner's constitutional claim on the merits, and that adjudication rests on state court fact-finding that passes muster as rational, a habeas corpus attack consisting of a mere dispute about the facts disclosed by the state record must fail. For, under those circumstances, section 2254(d)(2) mandates that "relief shall not be granted."

Here, the record is clear that Petitioner is relying only on the state court record in support of his claim. (Slip. op., at 16170; RER at 291, 736, 964-65, 979-81, 1075, 1117-19, 1705-15, 1763-83, 1897.) The record provides ample support for the state court's factual findings that trial counsel acted reasonably. The majority of the panel mistakenly has second-guessed the factual findings of the

state court.

As aptly identified by the dissent, the record shows that the trial attorney counsel believed he could ask questions about the July 18 conversation between Petitioner and his wife (the conversation from the night after the murder) without waiving the privilege as to the conversation from July 17 (the night of the murder). (Slip. op. at 16171.) Trial counsel withdrew an earlier question about the July 17 conversation regarding the reason Petitioner was washing his hands, and "thereby avoided opening the door to [Petitioner's wife's] testimony about [Petitioner's] confession to her during that same conversation." (*Id.*) The question trial counsel did pursue with Petitioner was about the telephone call he received the next evening and what he told his wife about it, which "elicited from [Petitioner] evidence that both he and his wife had been threatened." (*Id.* (footnote omitted).) The dissent further cogently explained as follows:

> At the point when [trial counsel] asked this question, he was faced with a considerable amount of circumstantial evidence of [Petitioner's] guilt, an implicit confession related by the victim's cousin - who testified that [Petitioner] told him "And I'll fuck you up *too*" - and [Petitioner's] flight with his wife two days after the murder for no apparent reason other than consciousness of guilt. The only way [trial counsel] could combat the

inevitable inferences to be drawn from this evidence was to defuse the flight issue by making it look like [Petitioner] and his wife fled because they had been threatened, not because he was guilty or because his wife was scared of him instead of a threat by a third party.

(Slip. op. at 16171-72; *see* Appellant's Revised Opening Brief at 39-54.[2/])

Also, the fact that the trial court did not accept trial counsel's arguments regarding the scope of the privilege does not mean that trial counsel acted unreasonably in engaging in this tactic. (Slip. op. at 16170-73 (citing *People v. Worthington*, 38 Cal. App. 3d 359, 113 Cal. Rptr. 322 (1974)).) Although the trial court relied on *People v. Worthington* in finding that the marital communications privilege had been waived for all purposes, the dissent correctly identified that trial counsel's argument as to the waiver did not contradict *Worthington*. The dissent stated as follows:

[Trial counsel] argued that *Worthington* was distinguishable because the dueling versions of a communication between a husband and wife in that case all had to do with a single conversation. [Trial counsel] was quite correct on this point, and was not unreasonable in maintaining that *Worthington* could not possibly stand for the proposition that a waiver of

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2. A copy of the Appellant's Revised Opening Brief is attached hereto as Exhibit B.

> the marital communications privilege as to one conversation on one day about one subject opens the door to admission of confidential marital communications that occurred during a different conversation on a different day about a completely different subject.

(Slip Op. at 16172-73.)

Because review of a claim of ineffectiveness must be "highly deferential-and-doubly deferential," *Yarborough v. Gentry*, 540 U.S. 1, 5 (2003) (per curiam), the issue is not whether trial counsel in this case turned out to be wrong or that the trial court disagreed with him regarding the scope of the marital communications privilege. Rather, the issue is whether trial counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed" under the Sixth Amendment. *Bonin v. Calderon*, 59 F.3d 815, 833 (9th Cir. 1995). The dissent again correctly noted that the record shows that trial counsel was simply taking a "calculated risk" regarding the scope of the waiver where "had he succeeded, he would have been able to explain [Petitioner's] flight and maybe create reasonable doubt by suggesting that the person who made the threat was the murderer instead of [Petitioner]." (Slip. Op. at 16173.) Clearly, trial counsel's conduct was not the functional equivalent of leaving Petitioner without the counsel guaranteed by the Sixth Amendment.

Thus, because Petitioner offered no new evidence to rebut the state court determination that trial counsel made a reasonable tactical decision during the first trial, and because there is support in the record for the state court's determination, section 2254(d)(2) mandates that "relief shall not be granted" for Petitioner's ineffective assistance claim.

C. Section 2254(e)(1) Requires That A State Court Finding Be Presumed Correct; And That Presumption Cannot Be Overcome By Re-Weighing The Evidence In A State-Court Record If That Record Would Have Permitted A Rational Fact-Finder To Determine The Facts As The State Court Did

Even if section 2254(d)(2) were deemed inapplicable, Petitioner still cannot rebut the automatic "presumption of correctness" for state-court fact-finding provided in section 2254(e)(1). Sections 2254(d)(2) and (e)(1) represent "independent requirements." *Miller-el v. Cockrell*, 537 U.S. at 344. To prevail on a challenge to a state court fact determination, then, a state prisoner must overcome section 2254(e)(1) as well as section 2254(d)(2). *See id.* at 340, 348; *Wiggins v. Smith*, 539 U.S. 510, 528-30 (2003); *see also Miller-el v. Dretke*, 125 S. Ct. at 2325, 2340. Under section 2254(e)(1), which deals with discrete findings of fact as opposed to the threshold bar on relief governed by section 2254(d)(2), *see Miller-el v. Cockrell*, 537 U.S. at 341, a state court factual determination is automatically presumed to be correct.

Petitioner has the burden of rebutting the presumption of correctness not just with "convincing" evidence, as in former section 2254(d), but with "clear and convincing evidence." This is an extremely heavy burden. As the Supreme Court indicated in *Schneiderman v. United States*, 320 U.S. 118, 135 (1943), "clear and convincing evidence" may be said to leave the question in no doubt. In a case such as the one at bar - and indeed in virtually all cases in light of section 2254(d)(2) and the federal evidentiary-hearing restrictions in section 2254(e)(2), *cf. Williams v. Taylor*, 529 U.S. 420, 441-45 (2000) - any "clear and convincing evidence" determination would have to be made on the basis of the evidentiary record produced in the state court.

Because the presumption no longer depends upon "fair support" for the finding in the state record, *cf.* former section 2254(d), Petitioner may not discharge his burden merely by second-guessing state-court fact-findings. As with the "relief shall not be granted" rule in section 2254(d)(2), the enhanced section 2254(e)(1) presumption, when attacked solely on the state court record, cannot properly be said to be defeated by "clear and convincing evidence" if the state record contains "any substantial evidence" upon which "any rational trier of fact" could have found the facts as the state court did under the applicable burden of proof. For the reasons explained above, the record provides support for the state

court factual findings that trial counsel made a reasonable tactical decision, and Petitioner has not identified any clear and convincing evidence to support rebutting the presumption of correctness. In light of the evidence at the time Petitioner's trial attorney acted, there is definitely support for the state court's factual finding that counsel made a reasonable tactical decision when questioning Petitioner at the first trial. Accordingly, rehearing or rehearing en banc should be granted, the judgment of the District Court granting the Petition should be reversed, and this Court should order that the Petition should be denied.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests rehearing and/or rehearing en banc.

Dated: January 12, 2006

Respectfully submitted,

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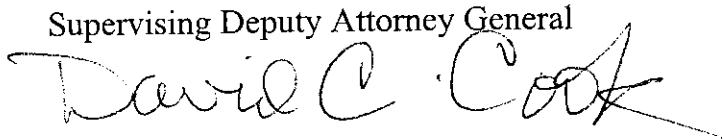

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APPELLANT'S REVISED OPENING BRIEF

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JURISDICTIONAL STATEMENT

On December 4, 2001, Petitioner-Appellee Kristopher Edwards (hereinafter "Petitioner") filed a Petition for Writ of Habeas Corpus in the United States District Court for the Central District of California pursuant to Title 28 U.S.C. § 2254. (Respondent's Amended Excerpts of Record [hereinafter "RER"] at 1929-44.) On April 13, 2004, the District Court entered its Judgment granting the Petition regarding Petitioner's claim of ineffective assistance of trial counsel, ordering that Petitioner be released from custody regarding his murder conviction and weapons-use enhancements or retried within ninety days, and denying the remainder of the Petition. (RER at 2017.)

On April 23, 2004, Respondent filed a Notice of Appeal in the District Court. (RER at 2018-19.) This Court has jurisdiction of this appeal pursuant to Title 28 U.S.C. §§ 2253(a), 1291. *Dows v. Wood*, 211 F.3d 480, 482 (9th Cir. 2000).

STATEMENT OF THE ISSUE

Whether the District Court erred in finding that the state court denial of Petitioner's ineffective assistance of trial counsel claim was an unreasonable application of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

BAIL STATUS OF PETITIONER

Petitioner is currently in custody of Respondent, Anthony A. Lamarque, Warden of the Salinas Valley State Prison, at Soledad, California. Petitioner is currently serving a sentence of life in state prison without the possibility of parole, plus seven years. (RER at 287-89.)

STATEMENT OF THE CASE

In Los Angeles County Superior Court case number BA136955, a

jury convicted Petitioner of first degree murder, Cal. Penal Code[1/] § 187(a), insurance fraud, § 548, and conspiracy to commit insurance fraud, §§ 182(a)(1), 548. The jury found that the murder was intentional and carried out for financial gain, § 190.2(a)(1), and found that Petitioner personally used a handgun in committing the first degree murder, § 12022.5(a). The jury also found that Petitioner had a prior conviction for robbery, § 211, that was a prior serious felony conviction, § 667(a)(1).[2/] (RER at 1-5, 94-95, 215.) The trial court sentenced Petitioner to life in state prison without the possibility of parole plus seven years. (RER at 284-86.) On May 12, 1999, Petitioner filed a notice of appeal. (RER at 297.)

On August 24, 2000, the California Court of Appeal affirmed Petitioner's conviction.[3/] (RER at 1891-1901.) On or about September 21, 2000, Petitioner filed a petition for review in the California Supreme Court. (RER at

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1. Unless otherwise indicated, all further statutory references are to the California Penal Code.

2. Petitioner's first trial resulted in convictions for insurance fraud and conspiracy to commit insurance fraud, but the jury deadlocked as to the murder charge. Petitioner subsequently was retried and convicted of first degree murder. The jury in Petitioner's second trial found true the murder for financial gain and firearm-use allegations. (RER at 94-95, 215.)

3. The court of appeal modified the judgment by striking the $1,000 parole revocation fine that had been imposed by the trial court pursuant to section 1202.45.

1902-27.) The petition for review was denied on November 29, 2000. (RER at 1928.)

Petitioner's federal Petition was filed on December 4, 2001. (RER at 1929-44.) On April 24, 2002, Respondent filed an Answer to the Petition. Petitioner filed a Traverse on June 21, 2002. (RER at 2024.)

On January 15, 2004, the magistrate judge issued a Report and Recommendation wherein it was recommended that the Petition be granted as to Petitioner's claim of ineffective assistance of trial counsel, that Petitioner be released from state custody for his murder conviction and weapons-use enhancement or retried within ninety days of the entry of judgment, and that the Petition be denied as to the remainder of the claims. (RER at 1945-92.)

On February 9, 2004, Respondent filed Objections to the Report and Recommendation. (RER at 1993-2015.)

On April 12, 2004, the District Court adopted the Report and Recommendation. (RER at 2016.) The District Court filed its Judgment granting the Petition as to Petitioner's claim of ineffective assistance of trial counsel, ordering that Petitioner be released from state custody for his murder conviction and weapons-use enhancement or retried within ninety days of the entry of judgment, and denying the Petition as to the remainder of the claims. The

Judgment was entered on April 13, 2004. (RER at 2017.) This appeal followed.

STATEMENT OF FACTS

A. Prosecution Evidence

At some time in 1990, Petitioner and Don Thomas conspired to defraud Petitioner's automobile insurance company. According to their plan, Mr. Thomas would take Petitioner's Mercedes Benz and strip parts from the car. Mr. Thomas would abandon the car, Petitioner would report the car as stolen, and Petitioner would make an insurance claim for the stolen parts. The parts would then be replaced on the car. Petitioner agreed to pay Mr. Thomas for his participation. In late 1990 or early 1991, Mr. Thomas obtained Petitioner's car, stripped it, and abandoned it according to their plan. In February of 1991, Petitioner and his wife, Kemet Rio Gaines, reported the car as stolen to the police. Petitioner fabricated a detailed story about how two armed assailants had carjacked them. Petitioner then filed a claim with his insurance company. Because Mr. Thomas had stripped too many parts from the car, the insurance company found that the car was "totaled." Thus, Petitioner would not get as much money as he thought he would from the insurance company. Petitioner was angry, and he told Ms. Gaines that Mr. Thomas was stupid for removing so many parts

from the car. (RER at 1079-1096.)

Mr. Thomas called Petitioner's house frequently demanding his share of the insurance proceeds. At times, these conversations were heated, and Mr. Thomas and Petitioner threatened each other. Petitioner told Mr. Thomas he would pay him when the insurance money arrived. In February or March of 1991, Petitioner threatened Mr. Thomas with a gun. Mr. Thomas began calling Petitioner more frequently between May and July of 1991. (RER at 1002, 1010-12, 1018, 1098.) On July 10, 1991, Petitioner received a check for $3,267.86 from the insurance company and deposited the check in his bank. (RER at 1339-40, 1387, 1531.)

On the evening of July 17, Petitioner telephoned Mr. Thomas and told Mr. Thomas to meet him at the barbershop where Petitioner worked. (RER at 1381-85.) Mr. Thomas's body was found in the alley behind the barbershop later that evening. He had died from multiple gunshot wounds. Mr. Thomas was shot with a .9 millimeter handgun that was registered to Ms. Gaines, and with a .380 caliber handgun. Ms. Gaines was later found to have owned a .380 caliber handgun, but that handgun was unavailable for testing in the investigation of Mr. Thomas's murder. However, a .380 caliber bullet removed from Mr. Thomas's body was consistent with being fired from the type of .380 caliber handgun

registered to Ms. Gaines. (RER at 1078-83, 1207-09, 1233-36, 1256-57, 1260-67, 1287, 1292, 1307-14, 1349-50.)

When Ms. Gaines returned home on the evening of July 17, Petitioner met Ms. Gaines at the front door. He was acting "weird" and "antsy." Petitioner had a white substance on his hands, which was also on the walls near the door. Ms. Gaines followed Petitioner to the bathroom, where he scrubbed his hands with laundry detergent. Ms. Gaines asked Petitioner what he was doing. Petitioner did not answer. Ms. Gaines asked Petitioner again what he was doing, and Petitioner told her that she did not have to worry about Mr. Thomas calling the house anymore. Ms. Gaines asked Petitioner if he had killed Mr. Thomas, and Petitioner replied, "Yeah." (RER at 1098-1103.)

On July 19, Petitioner and Ms. Gaines drove to Florida and stayed there for a few days. Petitioner and Ms. Gaines then drove to Detroit, Michigan, where they rented an apartment. In April of 1992, Ms. Gaines returned to Los Angeles. (RER at 1109-12.) Through information provided by Ms. Gaines, the police located Petitioner in Detroit, Michigan in 1996 and arrested him. (RER at 1372.)

B. Defense Evidence

Petitioner testified on his own behalf and denied killing Mr. Thomas. (RER at 1465, 1498-90, 1510.) Petitioner was at home at the time Mr. Thomas was shot. (RER at 1498.) Petitioner had agreed to pay Mr. Thomas $1,500 for his involvement in the insurance fraud. (RER at 1480, 1531.) Petitioner had given Mr. Thomas the .9 millimeter and the .380 caliber handguns owned by Ms. Gaines. Petitioner and Mr. Thomas agreed that Petitioner would pay Mr. Thomas the full $1,500 when the insurance check arrived, but Petitioner would pay Mr. Thomas only $1,000 if Mr. Thomas wanted to keep the handguns. (RER at 1486-87.)

On the evening of July 16, 1991, Petitioner called Mr. Thomas and told him the check from the insurance company would clear the next day, and Mr. Thomas could come and get his money. Petitioner told Mr. Thomas he could either come to the barbershop during the next day or to Petitioner's house in the evening to collect his money. Mr. Thomas did not come to the barbershop or to Petitioner's home on July 17. When Ms. Gaines returned home in the evening of July 17, Petitioner said that one of his dogs had an "accident" on the carpet and that he had cleaned it. (RER at 1490-92, 1496-98.)

On July 18, 1991, Mr. Thomas's cousin, Tyrone Melton, telephoned Petitioner and accused Petitioner of killing Mr. Thomas. (RER at 1500-01.) On the evening of July 18, Petitioner received a telephone call at home. The anonymous caller told Petitioner, "'You and that bitch are dead. We know where you live, we know where you work.'" (RER at 1502-04.) Petitioner and Ms. Gaines stayed in a motel that night and left California the next day in fear. (RER at 1506-07.)

Seven latent fingerprints were recovered from Mr. Thomas's truck. Four of the fingerprints matched those of Mr. Thomas. The remaining three fingerprints were never matched to any individual. None of the fingerprints matched Petitioner. (RER at 1328-32.)

Gunshot residue was found on Mr. Thomas's right hand but not on his left hand. The presence of gunshot residue indicated that Mr. Thomas had either discharged a firearm or had his hands in an environment of gunshot residue. An environment of gunshot residue means one of the following: 1) being in close proximity to a gun that was discharged; 2) handling a previously discharged firearm; or 3) someone with gunshot residue on his hand touched Mr. Thomas's hand. (RER at 1399-1402.)

SUMMARY OF ARGUMENT

The District Court made three errors in determining that Petitioner was entitled to federal habeas relief regarding his ineffective assistance of trial counsel claim. First, the District Court erroneously found that no deference should be given to the trial court's finding that John Meyers, Petitioner's trial counsel at the first trial, made a tactical decision in asking Petitioner questions about his statements he made to his wife, Kemet Gaines, following the murder of Donald Thomas. Although Meyers claimed that he made a "mistake" in asking the questions of Petitioner that were found to have waived the confidential marital communications privilege, the trial court found that Meyers was not credible, and instead found that it was a tactical decision to ask the questions. The District Court erroneously refused to accept the trial court's determination of Meyers' credibility regarding his explanation about his trial tactics.

Next, the District Court erroneously found that Meyers acted unreasonably in questioning of Petitioner regarding the statements he made to Ms. Gaines following the murder. Meyers acted reasonably in questioning Petitioner about his statements to Ms. Gaines following the murder because Petitioner's responses allowed crucial defense evidence to be introduced while still allowing the defense a strong argument for impeaching Ms. Gaines regarding the

incriminating statements she would eventually make during rebuttal.

Even if Meyers' questioning of Petitioner was unreasonable, the District Court erroneously found that Petitioner suffered prejudice from the waiver of the confidential marital communications privilege. The trial court properly instructed the jury that it was to determine whether, in fact, Petitioner made any confessions to Ms. Gaines, and that oral admissions made outside of court should be viewed with caution. In addition, the waiver of the privilege allowed Petitioner to introduce other favorable statements that he made to Ms. Gaines. Moreover, the admissions Petitioner made to Ms. Gaines were cumulative to those that he made to persons other than Ms. Gaines. Had the waiver not occurred, the prosecution evidence was so strong that Petitioner would not have received a more favorable result at trial.

Consequently, this Court should reverse the District Court's Judgment and find that the state court denial of Petitioner's ineffective assistance of trial counsel claim was not contrary to, or an unreasonable application of, *Strickland v. Washington*.

STANDARD OF REVIEW

This Court reviews de novo the decision of a district court to grant or deny a petition for writ of habeas corpus. *Wade v. Terhune*, 202 F.3d 1190,

1194 (9th Cir. 2000); *Houston v. Roe*, 177 F.3d 901, 905 (9th Cir. 1999). Findings of fact made by the district court are reviewed for clear error. *Houston*, 177 F.3d at 905.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective on April 24, 1996. When a state court adjudicates a claim on the merits, AEDPA bars federal habeas corpus relief on that claim unless the state-court adjudication was either (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Price v. Vincent*, 123 S. Ct. 1848, 1853 (2003); *Miller-el v. Cockrell*, 537 U.S. 322, 337 (2003) ("Statutes such as AEDPA have placed more, rather than fewer, restrictions on the power of federal courts to grant writs of habeas corpus to state prisoners.").

A state court decision is "contrary to" federal law if it either "applies a rule that contradicts the governing law" as set forth in Supreme Court opinions, or reaches a different decision from a Supreme Court opinion when confronted with materially indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *accord Bell v. Cone*, 535 U.S. 685, 694 (2002); *Clark v. Murphy*, 331 F.3d

1062, 1067 (9th Cir. 2003). A state court makes an "unreasonable application" of federal law if the state court identifies the correct governing legal principle from the Supreme Court's decisions, but unreasonably applies that principle to the facts of the prisoner's case. *Williams*, 529 U.S. at 413; *Bell*, 535 U.S. at 694; *accord Lockyer v. Andrade*, 538 U.S. 63, 71 (2003) ("AEDPA does not require a federal habeas court to adopt any one methodology in deciding the only question that matters under § 2254(d)(1) -- whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law").

However, it is not enough merely to show that the state court was incorrect. Federal habeas corpus relief is not available simply because a federal court independently concludes "that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Williams*, 529 U.S. at 411; *accord Lockyer*, 538 U.S. at 75-76; *Early v. Packer*, 537 U.S. 3, 11 (2002); *Bell*, 535 U.S. at 694; *Hernandez v. Small*, 282 F.3d 1132, 1140 (9th Cir. 2002). Moreover, decisions of the Supreme Court are the only ones that can form the basis justifying habeas relief; lower federal courts cannot themselves establish such a principle to satisfy the AEDPA bar. *Clark*, 331 F.3d at 1069; *Hernandez*, 282 F.3d at 1140 (any principle on which a petitioner seeks to rely must be found in the holdings, as opposed to

dicta, of the Supreme Court decisions).

A state court's failure to cite any federal law in its opinion does not run afoul of the AEDPA. In fact, a state court need not even be aware of applicable Supreme Court precedent "so long as neither the reasoning nor the result of the state-court decision contradicts them." *Early*, 537 U.S. at 8.

Here, Petitioner's claim that he received ineffective assistance of trial counsel was raised and rejected on the merits by the superior court at Petitioner's first trial (RER at 736), the superior court at Petitioner's retrial (RER at 129-42, 216-83, 290-92, 934-55, 979-81, 1070-75, 1117-19, 1705-15), and by the California Court of Appeal on direct appeal (RER at 1740-83, 1868-74, 1895-97).

Therefore, Petitioner is entitled to federal habeas relief for this claim only if the denial of his claim in state court was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Price*, 123 S. Ct. at 1853; *Miller-el*, 537 U.S. at 337.

ARGUMENT

THE DISTRICT COURT ERRONEOUSLY FOUND THAT THE STATE COURT HAD UNREASONABLY DENIED PETITIONER'S CLAIM OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

In Ground Two of the Petition, Petitioner alleged that he received ineffective assistance of trial counsel. Specifically, Petitioner argued that John Meyers, Petitioner's trial counsel at his first trial, erred by failing to preserve the confidential marital communications privilege. (RER at 1934-35, 1939-40.) Respondent submits that the District Court erroneously granted Petitioner federal habeas relief on this claim. The claim had been properly denied on the merits by the superior court at Petitioner's first trial (RER at 736), the superior court at Petitioner's retrial (RER at 129-42, 216-83, 290-92, 934-55, 979-81, 1070-75, 1117-19, 1705-15), and by the California Court of Appeal on direct appeal (RER at 1740-83, 1868-74, 1895-97).

The District Court was obligated to give deference to the trial court's finding that Meyers made a tactical decision in his questioning Petitioner even though that questioning resulted in a waiver of the confidential marital communications privilege. Meyers' conduct of asking Petitioner about statements he made to his wife, Kemet Gaines, following the murder was a reasonable tactical

decision because of the strong prosecution evidence that had been presented at the time of the questioning. Lastly, even if Meyers acted unreasonably in asking Petitioner about the statements he made to Ms. Gaines, Petitioner suffered no prejudice. Thus, the District Court's Judgment granting Petitioner federal habeas relief on this claim should be reversed.

A. Relevant Proceedings In The State Court

1. Pretrial Arguments Regarding The Marital Communications Privilege

On March 19, 1998, prior to Petitioner's first trial, the parties presented arguments to the superior court regarding the scope of the confidential marital communications privilege. Meyers raised concerns that no communications between Petitioner and Ms. Gaines, regarding the murder or why he was vigorously washing his hands the night of the murder be mentioned during her testimony. The trial court accepted the prosecutor's representation that Ms. Gaines testimony would not refer to any privileged marital communications with Petitioner following the murder. (RER at 6-9, 305-09.)

2. The Testimony Of Petitioner And Ms. Gaines At Petitioner's First Trial

During cross-examination of Ms. Gaines, Meyers asked her about finding Petitioner washing his hands on the night of the murder. Meyers asked Ms. Gaines, "Did he tell you one of the dogs had dirtied up in the front room?" Ms. Gaines replied, "No, sir." Ms. Gaines answered in the affirmative when Meyers next asked, "Did you ask him why he was washing his hands?" The prosecutor objected when Meyers asked Ms. Gaines "What did he tell you?" (RER at 634-35.)

At side-bar, Meyers was cautioned that the statements he asked Ms. Gaines about were confidential marital communications. Meyers agreed to withdraw the question. (RER at 635-38.)

During the direct examination of Petitioner, Petitioner testified that Ms. Gaines was at her brother's home on the night of the murder. Meyers asked Petitioner, "Did you suggest she go over there, her brother's house?" Petitioner replied, "Yes, I did." The prosecutor did not object to Meyers' question or Petitioner's answer. (RER at 711.)

Petitioner subsequently testified that he received a telephone call the night after the murder. The caller had an angry tone of voice. Petitioner then turned off the lights in their home, loaded a shotgun, and stood by one of the

windows. (RER at 722.) Ms. Gaines "started hollering, 'What's going on? What's going on? What's happening? What's wrong? What's going on?'" Meyers asked Petitioner, "Did you tell her anything?" Petitioner replied, "I told her, 'Somebody killed Don [Thomas] and they think I had something to do with it, and they just threatened to come and kill us.'" The prosecutor objected to this testimony. (RER at 722-23.)

At side-bar, the prosecutor argued that the confidential marital communications privilege was waived because of Petitioner's testimony. The trial court agreed, but gave Meyers an opportunity to brief the issue. Meyers believed that the California Evidence Code allowed waiver as to only specific, individual communications rather than a waiver as to a single communication resulting in a total waiver of every communication. (RER at 723-28.)

The next day, outside the presence of the jury, the trial court heard arguments regarding the waiver of the marital communications privilege. (RER at 729-37.) Meyers argued that under *People v. Worthington*, 38 Cal. App. 3d 359, 113 Cal. Rptr. 322 (1974), a waiver of the privilege as to a single, individual communication does not result in a waiver of the privilege for all marital communications. (RER at 729-30, 734-35.) The trial court disagreed with Meyers and found that the marital communications privilege had been waived in its

entirety. (RER at 735.)

Meyers then argued that he had committed ineffective assistance of counsel because he made a mistake in asking the question which called for Petitioner to testify about confidential marital communications. The trial court disagreed and found that, despite Meyers' argument, he had made a tactical decision. The trial court stated, "[a]nd I think it's a tactical decision. Maybe you didn't anticipate it was breaching the privilege . . . but I don't see it as ineffective assistance." (RER at 736.)

Ms. Gaines testified in rebuttal that on the night of the murder, Petitioner told her to go to her brother's home. She thought this was "very odd" because Petitioner did not usually urge her to spend time with her family. (RER at 776.) The following testimony occurred regarding Ms. Gaines seeing Petitioner washing his hands upon her return home on the night of the murder:

> Q [by the prosecutor]: When you saw him scrubbing his hands, did you say anything to him?
>
> A [by Ms. Gaines]: Yes.
>
> Q: What did you say?
>
> A: I asked him what did he do?
>
> Q: And what did he reply?

A: I – he didn't really say anything. I asked him again, what did he do.

Q: And then what happened?

A: He didn't reply. And then I asked him had he killed Don.

Q: And what did he reply when you asked him had he killed Don?

A: He said, "I'll put it to you like this: you don't have to worry about hearing from him again."

(RER at 778.)

3. Closing Argument At The First Trial

During argument at the end of the trial, the prosecutor referred to Petitioner's statements to Ms. Gaines. (RER at 871-74.)

Meyers attacked Ms. Gaines' credibility during argument, calling her an "admitted liar" who also was an "accomplice and conspirator to defraud the insurance company." (RER at 884.) Ms. Gaines had a motive to lie during her testimony because she "stood to gain from the insurance scam" and because she "secured a grant of immunity" which meant that "she can't be prosecuted for any crimes she admits to on the witness stand." (RER at 885.) Meyers further argued as follows:

Here is a woman that's testifying and she knows she can't be prosecuted for any crimes arising out of her testimony. You think that might be an incentive to fudge or lie? I would think so from this evidence. She could lie all the way through this trial.

(RER at 886-87.)

Meyers further argued as follows regarding the evidence about Petitioner washing his hands on the night of the murder:

Talking about the dog stuff here a little. [Petitioner] and his wife Kemet stated they had two dogs. One was a puppy. [Petitioner] told you the night in question here Kemet describes him washing his hands and so forth; that the puppy wasn't housebroken. And Kemet agrees with that. It wasn't housebroken.

And that puppy had dirtied up the rug in the front room of the living room. He was cleaning up the mess before she got home. So he had a bucket of suds to do that. I don't know if any of you have dogs, animals. Maybe you did that before yourself. It doesn't seem too onerous to me.

The D.A. wants to think [Petitioner] was cleaning blood off his hands and now she throws in maybe he is cleaning off G.S.R. off his

hands. How would Kemet know about G.S.R.? He was cleaning blood off his hands, maybe I could understand that. But the way this homicide was committed, the distance the guy was shot, Thomas – there wouldn't be any blood on his hands anyway. Who is going to think about G.S.R.? That just came up today. It makes no sense.

But Kemet was testifying that something ominous about; that he is really scrubbing his hands with this detergent, this bucket of suds near the bathroom as she came in. There is no evidence that anybody would have had any blood on their hands in this case, whoever the murderer was. None.

(RER at 891-92.)

Meyers further attacked Ms. Gaines' credibility with her motive to lie about her testimony and the implausibility of her testimony. (RER at 893-95.) He specifically argued as follows regarding Petitioner's admissions to Ms. Gaines:

So her statements about [Petitioner's] admission to her that "I killed Thomas. You won't have to worry about him anymore," I suggest to you you view those very much with caution. That woman is an admitted liar. She doesn't like him. She hates him. She would like to see him go down in this case.

(RER at 895.)

4. Argument Regarding The Confidential Marital Communications Privilege At The Retrial

Prior to the retrial on the murder charge, the court[4] heard argument regarding whether the waiver of the marital privilege that occurred in the first trial also applied to the retrial. (RER at 934-55.) Joseph Gutierrez, Petitioner's new trial counsel,[5] stated that his position regarding the waiver was that: (1) Meyers did not intend to waive the marital communications privilege, (2) Meyers' error in the first trial was reversible error, (3) the waiver, if any, was limited to the statement Petitioner made to Ms. Gaines regarding the threatening telephone call he claims to have received, (4) the trial court erroneously found that the waiver applied to all of the confidential marital communications, and (5) the waiver from the first trial was not applicable to the second trial. (RER at 129-42, 938-39.)

The parties stipulated that had Meyers been called to testify, he would have testified that he made a mistake in asking Petitioner the questions which resulted in the waiver of the confidential marital communications privilege. (RER

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4. The judge from the first trial, the Honorable Patricia Collins, was replaced by the Honorable David Wesley. (RER 298, 934.)

5. Joseph Gutierrez represented Petitioner in the retrial after Meyers was relieved pursuant to *People v. Marsden*, 2 Cal. 3d 118, 465 Cal. Rptr. 44 (1970). (RER at 934-39.)

at 964-65.) Petitioner testified that Meyers did not discuss the confidential marital communications privilege with him. Petitioner also testified that Meyers did not inform him prior to his testifying at the first trial that he counsel would ask questions about communications to Ms. Gaines. (RER at 958-64.)

After hearing argument from both parties, the trial court found that the waiver of the confidential marital communications privilege would apply to the retrial. (RER at 964-86.) The trial court agreed with the factual finding made by the first trial court that Meyers made a tactical decision to ask the questions which resulted in the waiver of the confidential marital communications privilege. The trial court also found that Meyers was not ineffective. (RER at 979-81.)

Notably, after the trial court announced that the waiver would apply to the retrial, Gutierrez strenuously argued that the waiver be limited to only the conversation which Petitioner testified about, and only the statements Ms. Gaines referred to in her testimony at the first trial, rather than a waiver of the privilege for all of the confidential marital communications. (RER at 982-86, 1070-75.) The trial court acknowledged that the communications that Ms. Gaines would testify about were a "key piece of evidence" and that if erroneously admitted, "the court of appeals will have a lot of work before it." (RER at 1074-75.) The trial

court, however, re-stated its ruling that the waiver applied to all of the confidential marital communications between Petitioner and Ms. Gaines, and that Meyers was not ineffective. (RER at 1075.)

Later, during the retrial, Gutierrez renewed his argument that Meyers was ineffective in waiving the confidential marital communications privilege and moved for a mistrial. (RER at 1117-19.) In denying the motion for a mistrial, the trial court found as follows:

> That motion is denied. As I indicated before, actually what you had indicated doesn't change my mind, enforces my impression being aware of not only the exact area areas of testimony we're talking about, but of the court's previous ruling with respect to what was privileged and what wasn't and the People's offer cannot proceed into certain areas with the understanding that the privilege did apply to those areas.
>
> Being aware of all that, [Meyers] chose to get as close as he could hoping to cross the line. He got a couple of warnings and as you say the last time he simply crossed the line. I can't view that as anything else but a tactical decision by the attorney to put on the case as he sees fit trying to cross the line, and he made a tactical mistake

in my opinion. And that tactical mistake started when he called the defendant to the witness stand after having invoked the privilege.

(RER at 1119.)

At the retrial, Ms. Gaines testified that when she returned home on the night of the murder, Petitioner was scrubbing his hands. She asked Petitioner what he was doing. Petitioner did not respond at first. Then, Petitioner said that she did not "have to worry about Don calling the house anymore." (RER at 1101-02.) Ms. Gaines next asked Petitioner if he killed him. Petitioner replied, "Yeah." (RER at 1102-03, 1167.)

Petitioner denied making these statements to Ms. Gaines when she returned home. (RER at 1499.)

During argument to the jury, the prosecutor referred to Petitioner's admission to Ms. Gaines that he killed Mr. Thomas. (RER at 1595, 1611-12, 1683-86.) Gutierrez also referred to Ms. Gaines' testimony about the statements in arguing that she lacked credibility. (RER at 1647-51, 1656-57.)

5. Petitioner's Motion For A New Trial

Following his conviction for murder, Petitioner moved for a new trial arguing that the trial court erroneously found that the marital communications privilege had been waived, and because Petitioner received ineffective assistance

of trial counsel with respect to Meyers' failure to preserve the privilege. (RER at 216-83, 290-92, 1705-15.) Petitioner expressly argued in his motion that even if the privilege had been waived as to one particular communication to his wife, the waiver did not necessarily apply to all of the confidential marital communications. (RER at 223-25.) In support of the motion, Meyers submitted a declaration stating that he did not make a tactical decision in asking the questions of Petitioner at the first trial that resulted in the waiver of the privilege. (RER at 291.) The trial court opined that without the communications evidence "the verdict may well have been a different one" and that if it were error to admit the communications evidence, the error was "reversible." (RER at 1713.) The trial court denied the motion for a new trial finding that Meyers had made a tactical decision to "get as much" favorable defense evidence "as he could" from Petitioner. (RER at 1714-15.) The trial court found as follows that Meyers' claim that he made a mistake was not credible because:

> the mea culpa from Mr. Meyer [sic] didn't come until after he had made his argument and pitch to the court and lost and the court had ruled that the privilege was waived. At that point he said, well, if it's waived, then it's I.A.C. Well, that's a nice way to try to protect your client, but I'm not sure that that's – that's a real admission of

incompetence of counsel.

(RER at 1714-15.)

6. Denial Of Petitioner's Claim In The Court Of Appeal

On direct appeal, Petitioner again argued that the trial court erroneously found that the confidential marital communications privilege was waived, that the waiver was limited in scope if any waiver did occur, and that Meyers rendered ineffective assistance of trial counsel for asking the question which resulted in the waiver of the privilege. (RER at 1763-83, 1827-48, 1868-74.) The court of appeal held that the trial court properly found the privilege had been waived at trial. (RER at 1895-97.) The court of appeal also held as follows in rejecting Petitioner's claim of ineffective assistance of trial counsel:

> In view of the strong evidence against [Petitioner], [Meyers] could reasonably have decided to introduce [Petitioner's] testimony regarding his version of the conversation he had with [Ms.] Gaines on the night of [the murder]. In fact, as previously noted, the first jury deadlocked on the murder charge. Since [Meyers] was aware that the trial court had ruled that [he] could not introduce evidence of the defense's version of a conversation between [Petitioner] and [Ms] Gaines without opening the door to the prosecution's version

of that conversation, the trial court reasonably determined that eliciting [Petitioner's] testimony regarding his conversation with [Ms] Gaines on the night of [the murder], was a reasonable tactical decision rather than ineffective assistance of counsel.

(RER at 1897.)

B. Relevant Legal Principles

Under the Sixth Amendment of the Constitution, criminal defendants are guaranteed "the right to have the assistance of counsel for [their] defense." "This constitutional right to counsel means that all defendants have the right to effective counsel." *LaGrand v. Stewart*, 133 F.3d 1253, 1271 (9th Cir. 1998) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

A criminal defendant who alleges he was deprived of his right to the effective assistance of counsel must establish that (1) his trial counsel "'made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment,'" and (2) "'the deficient performance prejudiced the defense.'" *Bonin v. Calderon*, 59 F.3d 815, 833 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 687); *Bell*, 122 S. Ct. at 1850; *Williams*, 529 U.S. at 390.

A criminal defendant who alleges he was deprived of his right to the

effective assistance of counsel must show that his counsel's performance fell "below an objective standard of reasonableness" and that the performance prejudiced the defendant. *Strickland*, 466 U.S. at 688; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833. The Supreme Court in *Strickland* directed reviewing courts in determining the reasonableness of counsel's conduct to focus on "all the circumstances." *Strickland*, 466 U.S. at 688; *LaGrand*, 133 F.3d at 1271. Furthermore:

> Prevailing norms of practice . . . are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 U.S. at 688-89; *LaGrand*, 133 F.3d at 1271.

The reviewing court's examination "of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833. According to the Supreme Court, judicial review of a *Strickland* claim is "highly deferential-and-doubly deferential when it is conducted through the lens of federal habeas." *Yarborough v. Gentry*, 124 S. Ct.

1, 4, 157 L. Ed. 2d 1 (2003); *see Delgado v. Lewis*, 223 F.3d 976, 981 (9th Cir. 2000) (*Strickland* standard referred to as "very forgiving").

The reviewing court also must employ a strong presumption that "counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833.

Furthermore, in assessing whether counsel rendered deficient performance, the reviewing court must "judge the challenged conduct based on the facts of the particular case, 'viewed as of the time of counsel's conduct.'" *LaGrand*, 133 F.3d at 1271 (quoting *Strickland*, 466 U.S. at 690). The reviewing court must "'neither second-guess counsel's decisions, nor apply the fabled twenty-twenty vision of hindsight.'" *LaGrand*, 133 F.3d at 1271 (quoting *Campbell v. Wood*, 18 F.3d 662, 673 (9th Cir. 1994)); *Bonin*, 59 F.3d at 833. To fairly assess counsel's performance, "every effort [must] be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *LaGrand*, 133 F.3d at 1271 (citing *Strickland*, 466 U.S. at 689); *Bonin*, 59 F.3d at 833.

To establish prejudice, the criminal defendant must prove that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different.'" *Bonin*, 59 F.3d at 833 (citation omitted); *see Strickland*, 466 U.S. at 687. In other words, there must be a reasonable "'probability sufficient to undermine confidence in the outcome' -- that, but for counsel's deficient performance, 'the result of the proceeding would have been different.'" *Franklin v. Johnson*, 290 F.3d 1223, 1237 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 694).

The standard for proving ineffectiveness *Strickland* is "rigorous" and "highly demanding." *Kimmelman v. Morrison*, 477 U.S. 365, 381-82 (1986); *see Paradis v. Arave*, 20 F.3d 950, 959 (9th Cir. 1994). "Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial. . . ." *Kimmelman*, 477 U.S. at 382.

The principles set forth in *Strickland* are "clearly established Federal law" under the AEDPA. *See Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997). Under the AEDPA, federal courts have a "limited" scope of review with respect to claims raised on habeas regarding allegations of ineffective assistance of counsel. *Dows*, 211 F.3d at 484.

C. Deference Was Owed To The Trial Court's Finding That Meyers Mad A Tactical Decision In Asking Petitioner Questions Which Resulted In The Waiver Of The Confidential Marital Privilege

The District Court recognized that the superior court and the court of appeal found that Meyers had made a tactical decision to ask Petitioner questions during the first trial which resulted in a waiver of the confidential marital communications. (RER at 1970.) The District Court, however, concluded that the factual finding was rebutted by clear and convincing evidence that Meyers simply made a mistake rather than a tactical decision. (RER at 1970-73.) This was the District Court's first error regarding Petitioner's ineffective assistance claim.

In federal habeas proceedings, state court findings of fact "shall be presumed to be correct" unless the petition has rebutted the presumption "clear and convincing evidence." 28 U.S.C. § 2254(e). Federal habeas courts have "no license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983); *cf. Sophanthavong v. Palmateer*, 365 F.3d 726, 733 (9th Cir. 2004). In fact, this Court has expressly held that a petitioner cannot simply rely upon evidence submitted to the state court to overturn a state court's credibility determination. *Sophanthavong*, 365 F.3d at 733 ("The evidence presented by Mr. Sophanthavong to the district court is the same proof that the state court found

was not believable. Mr. Sophanthavong did not submit any evidence in the district court to rebut the presumption that the state court's findings of fact and credibility determinations are correct as required by § 2254(e)(1).").

Here, the District Court found that Petitioner had rebutted the presumption of correctness regarding the state court finding of fact without having seen Meyers testify and without having received any evidence that was not already presented to the state court.[6] The District Court first found that Meyers personally told the first trial court that he made a mistake in asking the questions that resulted in the waiver of the confidential marital communications privilege. (RER at 1970.) Next, the District Court found that Meyers provided a declaration to the second trial court wherein he claimed that his waiver of the privilege was a mistake. (RER at 1970-71.) The District Court ruled that the trial court erroneously failed to believe Meyers because his questioning and arguments

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6. Ironically, the District Court later applied this rule regarding credibility determinations in addressing prejudice. The District Court found that the statements of the second trial court regarding prejudice were "highly persuasive" because "[t]he trial court – which saw the witnesses and other evidence and was in the best position to make an assessment of the impact of [P]etitioner's admissions - did" find prejudice. (RER at 1981.) The District Court offered no explanation for why the second trial court's observations were to be considered "highly persuasive" regarding prejudice, but the first trial court's observations were not to be given deference regarding the finding that Meyers had made a tactical decision.

during the first trial showed that he did not understand the scope of the confidential marital communications privilege and that admitting his mistake could affect his reputation as an attorney. (RER at 1971-73.)

All of the evidence upon which the District Court relied was presented to the state court. (RER at 291, 736, 964-65, 979-81, 1075, 1117-19, 1705-15, 1763-83, 1897.) Moreover, the District Court's concern for Meyers' reputation is only the sheerest of speculation. In California, Meyers' misconduct, if any, would only subject him to a malpractice claim by Petitioner if Petitioner could establish his actual innocence of the crime. *Coscia v. McKenna & Cuneo*, 25 Cal. 4th 1194, 1999-1200, 108 Cal. Rptr. 2d 471 (2001); *Wiley v. County of San Diego*, 19 Cal. 4th 532, 534, 79 Cal. Rptr. 2d 672 (1998). Petitioner has made no such actual innocence claim. He also provided no evidence to the District Court that anything negative would happen regarding Meyers' professional reputation such as the filing of a complaint against Meyers with the State Bar of California. Moreover, the District Court's concerns regarding potential harm to Meyers' reputation are irrelevant to the determination of whether deference is owed to the state courts' finding of fact regarding his tactical decision because the potential of harm to Meyers' reputation was certainly before the first trial court as well as the other state courts when the factual finding was made. Apparently, any

perceived threat to Meyers' reputation was not sufficient to find his claim of "mistake" to be credible.

Additionally, each of the state courts that addressed the matter appeared certain that Meyers had made a tactical decision rather than a mistake. (*See* RER at 736 (the first trial court found Meyers' question to be a "tactical decision. Maybe you didn't anticipate it was breaching the privilege . . . but I don't see it as ineffective assistance."); RER at 1119 (the second trial court found that further argument regarding the tactical decision issue "doesn't change my mind, enforces my impression . . . that, [Meyers] chose to get as close as he could hoping to cross the line. He got a couple of warnings and as you say the last time he simply crossed the line. I can't view that as anything else but a tactical decision by the attorney to put on the case as he sees fit trying to cross the line, and he made a tactical mistake in my opinion. And that tactical mistake started when he called the defendant to the witness stand after having invoked the privilege."); RER at 1714-15 (the second trial court subsequently found that Meyers' claim that he made a mistake was not credible because "the mea culpa from Mr. Meyer [sic] didn't come until after he had made his argument and pitch to the court and lost and the court had ruled that the privilege was waived. At that point he said, well, if it's waived, then it's I.A.C. Well, that's a nice way to try to

protect your client, but I'm not sure that that's – that's a real admission of incompetence of counsel."); RER at 1897 (the court of appeal found that "[i]n view of the strong evidence against [Petitioner], [Meyers] could reasonably have decided to introduce [Petitioner's] testimony regarding his version of the conversation he had with [Ms.] Gaines on the night of [the murder]. . . . Since [Meyers] was aware that the trial court had ruled that [he] could not introduce evidence of the defense's version of a conversation between [Petitioner] and [Ms] Gaines without opening the door to the prosecution's version of that conversation, the trial court reasonably determined that eliciting [Petitioner's] testimony regarding his conversation with [Ms] Gaines on the night of [the murder], was a reasonable tactical decision rather than ineffective assistance of counsel.").)

The first trial court observed the conduct and explanation of Meyers regarding his alleged "mistake" and found that it was a tactical decision. As shown above, there is adequate support for the finding of fact because Meyers was attempting to admit beneficial defense evidence while maintaining the confidential marital communications privilege. Petitioner failed to submit any new evidence that was clear and convincing to rebut the state court factual finding. Additionally, the District Court's factual finding regarding Meyers' "mistake" was clear error because the District Court was not entitled to replace the state court

credibility determination regarding Meyers with its own credibility determination simply due to there being evidence that may have cast doubt on the state court's finding. *McClure v. Thompson*, 323 F.3d 1233, 1243 (9th Cir.), *cert. denied sub nom., McClure v. Belleque*, 124 S. Ct. 804 (2003) (state findings of fact entitled to deference even though evidence cast doubt on the findings such that federal court may have made different findings of fact). Consequently, the state court finding of fact was entitled to deference.

D. When Viewed As Of The Time Meyers Acted, And With The High And Double Deference Owed To Counsel's Tactical Decisions, Meyer's Conduct Was Well Within The Wide Range Of Reasonable Professional Assistance

The rules for determining the reasonableness of counsel's conduct are quite clear. The petition must show that counsel acted "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833. The review "of counsel's performance must be highly deferential." *Strickland*, 466 U.S. at 689; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833. Under AEDPA, the review is "highly deferential-and-doubly deferential." *Yarborough*, 124 S. Ct. at 4. This Court has characterized the review as "very forgiving." *Delgado*, 223 F.3d at 981. In fact, the reviewing court must presume that "counsel's conduct falls within the wide range of

reasonable professional assistance." *Strickland*, 466 U.S. at 689; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833.

This Court has cautioned that the reviewing court cannot simply "second-guess" trial counsel's decisions or view them under the "'fabled twenty-twenty vision of hindsight.'" *LaGrand*, 133 F.3d at 1271 (quoting *Campbell*, 18 F.3d at 673); *Bonin*, 59 F.3d at 833. Every effort must be made to "reconstruct the circumstances of counsel's challenged conduct," *LaGrand*, 133 F.3d at 1271, and view the facts "'as of the time of counsel's conduct.'" *Id.* (quoting *Strickland*, 466 U.S. at 690); *Bonin*, 59 F.3d at 833.

The District Court's second error in this case was in finding that Meyer's conduct was unreasonable despite the need to view his conduct at the time he acted and despite the need of giving high deference to counsel's decisions. (RER at 1973-79.) The District Court conducted a cost-benefit analysis and found that the cost of opening the door to Ms. Gaines' testimony about Petitioner's admissions that he killed Mr. Thomas outweighed the benefit he derived from the confidential marital communications he testified about. (RER at 1975-76.)

Before the confidential marital communications privilege was found to be waived, the state of the evidence very strongly favored the prosecution. Therefore, it was reasonable for Meyers to ask Petitioner a question to bring out

his confidential marital communications. To put this analysis in its proper context, the following is a summary of the evidence that had been admitted at the first trial at the time of the waiver occurred.

Petitioner, Ms. Gaines, and Mr. Thomas (the murder victim), agreed to participate in an insurance fraud scheme. Petitioner bought a Mercedes automobile which would be "stolen" by Mr. Thomas and Mr. Thomas' cousin, Tyrone Melton. The automobile was to be stripped and the parts sold. Then, the car was to be disposed of. Petitioner would file a false police report and insurance claim regarding the loss of the car. Petitioner would thereafter collect the insurance proceeds from the loss of the automobile. (RER at 311-23, 336-38, 359, 364-80, 385-89, 408-13, 445-47, 502-26, 600-13, 646, 685-95.)

Mr. Melton was present on at least one occasion when Mr. Thomas asked Petitioner for money. Petitioner told Mr. Thomas, "Quit sweating me, man. It's happening." (RER at 325.) On another occasion, Petitioner and Mr. Thomas were threatening each other "about kicking each other's butt." (RER at 326.) On yet another occasion, Mr. Thomas asked for his money, but Petitioner replied, "Boy, you don't know who you are fucking with. I'll kill you." (RER at 328.) During one occasion when Mr. Thomas confronted Petitioner about the money at Petitioner's place of employment, Petitioner opened a brief case and showed Mr.

Thomas and Mr. Melton a gun. (RER at 329-30.)

After Mr. Melton had learned of Mr. Thomas' death, he telephoned Petitioner at his home in the evening. (RER at 333-34.) Mr. Melton gave the following testimony about their conversation:

> Q (from the prosecutor): What, if anything did you say to [Petitioner]?
>
> A (from Mr. Melton): I told him I know what he done.
>
> Q: What did he reply?
>
> A: "What are you talking about?"
>
> Q: What did you say next?
>
> A: "Don't play games. I know you know what I am talking about." And I persisted to say that to him, and from that point he told me – he said, "And I'll fuck you up too."

(RER at 334-35.) Mr. Melton never saw Petitioner again. (RER at 335.)

Prior to entering the insurance fraud scheme, Petitioner directed his wife to purchase two handguns - a .380 automatic handgun and a .9 millimeter handgun. (RER at 474-82, 484-86, 492-95, 599-600.) Mr. Thomas was found to have been killed by gunshots fired from a .380 automatic handgun and a .9 millimeter handgun. (RER at 459, 520-51, 562-70.) The .9 millimeter bullets that

killed Mr. Thomas were fired from the .9 millimeter handgun that Ms. Gaines purchased. The .380 caliber bullets that killed Mr. Thomas were consistent with those that would have been fired from the .380 caliber handgun Ms. Gaines had purchased. The firearms expert was unable to test firings from the .380 caliber handgun that Ms. Gaines had purchased because it had been destroyed by the Los Angeles Police Department when Ms. Gaines could not be located to return the handgun to her. (RER at 562-70, 577-82.) Mr. Thomas was murdered in the alley behind the barbershop where Petitioner worked. (RER at 448-51, 587-88.)

On the night of the murder, Petitioner telephoned Ms. Gaines at her brother's home at approximately 10:00 p.m. and told her to return home. When she arrived, Petitioner was in the bathroom washing his hands with laundry detergent. Petitioner was acting nervous. (RER at 613-15.) The next night when Ms. Gaines returned home, Petitioner received a telephone call. After the call, Petitioner became really nervous. He retrieved a shotgun and looked out the window. They later went to a hotel to spend the night. Ms. Gaines was very frightened. (RER at 615-16.) She said that "the vibes and the atmosphere at that time was just very weird." (RER at 616.)

The next day, Petitioner and Ms. Gaines returned home and put some clothes in a trunk and trash bags. She did not see, and they did not pack, the .380

caliber handgun and the .9 millimeter handgun. (RER at 617-18.) They drove to the home of Ms. Gaines' brother to say good-bye, and Petitioner and Ms. Gaines left for Florida. They had made no prior plans to move to Florida. Ms. Gaines' mother, father, sister, brother, nieces, nephews, aunts, uncles, and grandparents lived in Los Angeles. She had no family in Florida. Petitioner's mother, sisters, nieces, and nephews lived in Los Angeles. (RER at 620-22.) Ms. Gaines had no desire to go to Florida. (RER at 621.)

After staying in Florida for only two days, Petitioner and Ms. Gaines moved again to Detroit. (RER at 623-24.) Ms. Gaines had no plans to move there and did not desire to go there. She moved back to Los Angeles approximately one year later. (RER at 624.)

One of the investigating officers attempted to contact Petitioner in Florida, but was unsuccessful. (RER at 462.) Petitioner eventually was apprehended in Detroit, Michigan. (RER at 666.)

On cross-examination of Ms. Gaines, Meyers brought out that Ms. Gaines received immunity from prosecution in exchange for her testimony. (RER at 625-26.) During Ms. Gaines' interview with the investigating officers, she told the officers that she hated Petitioner. (RER at 643-44.)

A criminalist for the Los Angeles County Coroner's office testified

for the defense that Mr. Thomas had gunshot residue on his hands at the time of his death. (RER at 678.)

Petitioner testified in his own defense. (RER at 682.) He admitted having entered the agreement with Mr. Thoms to strip the Mercedes automobile and eventually collect insurance proceeds. (RER at 685-95.) Mr. Thomas became impatient about getting his money from the insurance fraud scheme. (RER at 695-96.) Petitioner had sold to Mr. Thomas the .380 caliber handgun and the .9 millimeter handgun that Petitioner had directed Ms. Gaines to buy. Mr. Thomas was to pay Petitioner out of his share of the insurance fraud scheme proceeds. Petitioner gave the guns to Mr. Thomas a few months before the murder. (RER at 701-03.)

On the day before the murder, Petitioner telephoned Mr. Thomas to come to the barbershop where Petitioner worked the following day so he could pick up his money from the insurance proceeds. Mr. Thomas, however, did not come to the barbershop to meet Petitioner. Petitioner telephoned Mr. Thomas at approximately 7:30 in the evening to tell him to come to Petitioner's house for the money. Mr. Thomas never arrived. (RER at 706-11.) Petitioner denied killing Mr. Thomas and denied having a reason to kill Mr. Thomas. (RER at 695.)

Ms. Gaines returned home at 10:00 p.m. the evening of the murder.

When she arrived, Petitioner had detergent on his hands because he was cleaning a floor where his one of his dogs had urinated. Petitioner explained to Ms. Gaines why he was cleaning up the room. (RER at 711-15.)

Mr. Melton had called Petitioner's barbershop and told Petitioner that Mr. Thomas had been killed, he thought that Petitioner had killed him, and that Petitioner would be killed if he did not turn himself in to the authorities. (RER at 717-18.)

After Petitioner returned home that day, he received a telephone call. The speaker was a male and told Petitioner, "You and that bitch are dead. We know where you at. We know where you live." And then the caller hung up. (RER at 721.) Petitioner turned off the lights in the house, loaded a shotgun, and stood by the window. (RER at 722.) Petitioner testified as follows regarding the moments following the telephone call:

> Q (by Meyers): Where was [Ms. Gaines] at the time?
>
> A (by Petitioner): She started hollering, "What's going on? What's going on? What's happening? What's wrong? What's going on?"
>
> Q: Did you tell her anything?
>
> A: I told her, "Somebody killed Don and they think I had

something to do with it, and they just threatened to come and kill us." (RER at 722-23.) After this exchange, the trial court subsequently found that Meyers' question and Petitioner's answer resulted in a waiver of the confidential marital communications privilege. (RER at 723-37.)

Thus, the prosecution evidence at the time the waiver occurred was substantial. Mr. Thomas was upset Petitioner had not yet paid him his share of the insurance proceeds. On two occasions when Mr. Thomas complained, Petitioner showed Mr. Thomas a gun, and threatened to kill Mr. Thomas. Mr. Thomas was shot by a .9 millimeter that Petitioner had directed Ms. Gaines to purchase. Mr. Thomas also was shot by a .380 caliber handgun consistent with a second gun that Petitioner had directed Ms. Gaines to purchase.

On the night of the murder, Ms. Gaines arrived home to find Petitioner washing his hands with laundry detergent. Mr. Melton telephoned Petitioner to confront him about killing Mr. Thomas, Petitioner replied, "I'll fuck you up too." (RER at 334-35.) The next day, Petitioner and Ms. Gaines put clothes in a trunk and some trash bags and moved to Florida. They had made no prior plans to move to Florida. Ms. Gaines left her family in Los Angeles and no family in Florida. Ms. Gaines had no desire to go to Florida. Two days after arriving in Florida, they moved to Detroit.

The prosecution evidence showed that Petitioner had a motive to kill Mr. Thomas to avoid paying him his share of the insurance proceeds and stop his complaints. Petitioner had access to the murder weapon. Mr. Thomas was killed behind Petitioner's place of employment. Petitioner threatened to kill Mr. Melton when Mr. Melton confronted Petitioner. And finally, immediately after the murder, Petitioner and Ms. Gaines moved to Florida, and then Detroit, even though Ms. Gaines had no desire to leave Los Angeles.

Absent Petitioner's statements regarding the confidential marital communications, his only evidence was that Ms. Gaines received immunity from prosecution in exchange for her testimony, Ms. Gaines told the investigating officers that she hated Petitioner, Mr. Thomas had gunshot residue on his hands at the time of his death, and Petitioner claimed that he had sold the .380 caliber handgun and the .9 millimeter handgun to Mr. Thomas. Petitioner explained that he had laundry detergent on his hands because one of his dogs had urinated on the floor. Petitioner also said that he had received telephone calls threatening him.

The evidence of Petitioner fleeing California was significant because Ms. Gaines had testified that she accompanied Petitioner even though her mother, father, sister, brother, nieces, nephews, aunts, uncles, and grandparents all lived in Los Angeles, she had no family in either Florida or Detroit, and she had no

desire to go to either location. (RER at 620-24.)

The District Court blithely found that the benefits to countering this evidence "added little" and were "insignificant." (RER at 1977 (emphasis added).) On the contrary, "flight is essentially admission by conduct." *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1207 (9th Cir. 1991). Moreover, "the probative value of flight evidence depends upon all facts and circumstances and is a question of fact for the jury." *United States v. Harris*, 792 F.2d 866, 869 (9th Cir. 1986); *United States v. Morando-Alvarez*, 520 F.2d 882, 883-84 (9th Cir. 1975) (flight evidence found to probative in context of conviction for possession of marijuana).

The District Court mistakenly found that "since [Ms.] Gaines was married to [P]etitioner at the time of the incident, it is reasonably probable that the jurors would have believed, in the absence of further explanation, that she accompanied [P]etitioner out of town *simply because she was his wife*." (RER at 1977.) This finding by the District Court blatantly ignores the circumstances surrounding the fleeing to Florida and Detroit. It would be very difficult, if not impossible, to believe that a married woman would, on such short notice, move thousands of miles away from her entire family, without having made any prior plans, without having packed all of her belongings, without having any desire to

leave simply because her husband wanted her to do so.

Absent the confidential marital communications from Petitioner to his wife, the circumstances surrounding the flight evidence point almost exclusively to Petitioner's guilt. Petitioner had a motive to kill Mr. Thomas and a motive to avoid apprehension or retaliation for his murder. Mr. Thomas was murdered behind the barbershop where Petitioner worked. The prosecution evidence showed that Petitioner fled after having received Mr. Melton's telephone call to his home where Mr. Melton confronted Petitioner about the murder, and Petitioner acknowledged his guilt and threatened more violence by replying to Mr. Melton, "I'll fuck you up too." (RER at 334-35.)

Although Petitioner could have posited a theory that he needed to flee California to avoid retaliation against himself and Ms. Gaines for his being wrongfully accused of killing Mr. Thomas, Ms. Gaines' testimony belied such a claim. She did not want to leave California or her family. It would be reasonable to believe that Ms. Gaines would want to leave California (and in turn was lying about not wanting to leave) if there was direct evidence that she had been told of the threats to her safety. The only way Petitioner could establish that Ms. Gaines knew of these threats is to testify about the confidential marital communication he made explaining to her that her life was in jeopardy too. (See RER at 722-23)

(Petitioner told Ms. Gaines, "Somebody killed Don and they think I had something to do with it, and they just threatened to come and kill us.").) No other evidence would show that Ms. Gaines was being threatened too. By testifying as to the confidential marital communication, Petitioner now could present a theory that Ms. Gaines' testimony was false and that Petitioner fled out of concerns for his safety *and his wife's safety* rather than consciousness of guilt. (*See* RER at 886 (Meyers argued to the jury that Ms. Gaines "could lie all the way through this trial"); RER at 890 (Meyers argued to the jury that Petitioner "left because he was scared to death to be here. He didn't know who was behind the call, who was threatening to kill him and his wife.").)

The cost to Petitioner was not nearly as high the District Court found it to be. Waiver of the confidential marital communications privilege opened the door to Ms. Gaines testifying in rebuttal that Petitioner admitted to her that he killed Mr. Thomas. While the District Court correctly identified that confessions can be strong evidence of guilt (RER at 1980), the authority on which the District Court relied for that proposition all involved cases where the confession was made to law enforcement or some neutral party. *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) (addressing confessions coerced by the police); *Bruton v. United States*, 391 U.S. 123, 124-26 (1968) (addressing situation where co-defendant's

confession, obtained by government agent, implicated the petitioner and the co-defendant refused to testify at trial) and 391 U.S. at 139-40 (White, J., dissenting); *Hopt v. People*, 110 U.S. 574, 584-85 (1884) (discussing voluntariness of confession to police authorities); *Alcala v. Woodford*, 334 F.3d 862, 889-90 (9th Cir. 2003) (jailhouse informant lied to police about confession and lied on stand about what he told police - court acknowledged that some benefit could have come out).

The confession in this case was made in a significantly different context because it was made by Petitioner to his wife who had been granted immunity for her testimony. As the defense brought out, Ms. Gaines had participated in the insurance fraud scheme, was given immunity, and hated Petitioner. Petitioner would argue that she had a motive to lie about the confession. Therefore, opening the door to Ms. Gaines' testimony about Petitioner's confession was already subject to significant impeachment evidence. The jury would be called upon to resolve whether the confession had been made to Ms. Gaines by Petitioner. (RER at 838.) The jury also would be instructed that the evidence of Petitioner's "oral admission or confession . . . not made in court should be viewed with caution." (RER at 839.)

Meyers had other ammunition at his disposal to attack Ms. Gaines'

credibility regarding Petitioner's confession. He cross-examined Ms. Gaines extensively about why she automatically believed that Petitioner had killed Mr. Thomas simply by observing Petitioner scrubbing his hands with laundry detergent. (RER at 782-85.) In addition, Meyers was able to get Ms. Gaines to admit that she did not tell the investigating officers during her first police interview that Petitioner had confessed to her. Rather, she told the officers about the confession at the second interview. Meyers' questions implied that Ms. Gaines lied about the confession to "get back" at Petitioner. (RER at 787; RER at 785-89.)

Petitioner testified in surrebuttal that he did not confess to Ms. Gaines that he killed Ms. Thomas. Petitioner believed that Ms. Gaines was retaliating against him for leaving her in 1992. (RER at 796-99.)

Meyers also provided legal authority for his position that the waiver that occurred should have been limited to only the single conversation between Petitioner and Ms. Gaines rather than resulting in a waiver that included other conversations such as the confession. (RER at 729-35 (citing *Worthington*, 38 Cal. App. 3d 359).) Meyers' argument was repeated by Gutierrez in requesting that the waiver not apply to the second trial. (RER at 129-42, 938-39, 982-86, 1070-75.) The argument was again raised on direct appeal. (RER at 1768-73

(citing *Rodriguez v. Superior Court*, 14 Cal. App. 4th 1260, 1270, 18 Cal. Rptr. 2d 120 (1993) ("In effect, real party is arguing that disclosure of any portion of any conversation one may have had with a psychotherapist waives the privilege for all conversations. This is not so. Waiver of privilege as to one aspect of a protected relationship does not necessarily waive the privilege as to other aspects of the privileged relationship.").) Although Meyers' argument was ultimately unsuccessful, the argument was not so bereft of legal support that it was unreasonable for him to rely on the argument to limit the scope of the waiver, especially when favorable defense evidence was admitted because of the waiver.

Lastly, the court of appeal recognized that Petitioner realized a benefit to the waiver of the confidential marital communications privilege. In denying Petitioner's direct appeal claim of ineffective assistance of counsel, the court of appeal stated:

> In view of the strong evidence against [Petitioner], [Meyers] could reasonably have decided to introduce [Petitioner's] testimony regarding his version of the conversation he had with [Ms.] Gaines on the night of [the murder]. *In fact, as previously noted, the first jury deadlocked on the murder charge.* Since [Meyers] was aware that the trial court had ruled that [he] could not introduce evidence

> of the defense's version of a conversation between [Petitioner] and [Ms] Gaines without opening the door to the prosecution's version of that conversation, the trial court reasonably determined that eliciting [Petitioner's] testimony regarding his conversation with [Ms] Gaines on the night of [the murder], was a reasonable tactical decision rather than ineffective assistance of counsel.

(RER at 1897 (emphasis added).) In other words, the court of appeal believed that the reason Petitioner obtained the deadlock in the first trial was because he was allowed to introduce evidence of his statements to Ms. Gaines even though it resulted in opening the door to the admission of his confession.

The present case has substantial similarities to this Court's decision in *Davis v. Woodford*, 333 F.3d 982 (9th Cir. 2003). In *Davis*, trial counsel decided to call a psychological expert to testify at trial. *Id.* at 1000. The expert, however, explained to trial counsel that "in order to bolster his credibility with the jury, his practice was to offer candid and possibly damaging information from the stand." *Id.* Counsel sought a continuance to retain an expert who would not provide evidence favorable to the prosecution. After the request for continuance was denied, counsel decided to use the expert rather than proceed without any expert testimony. *Id.* at 1001.

The Court described the reasonableness of counsel's decision as follows:

> Counsel exercised appropriate professional judgment in choosing to put [the expert] on the stand despite the prospect that he might offer damaging information. When the effort to postpone the penalty phase and bring in a new psychiatric expert failed, defense counsel quite reasonably decided that the risk of a slight unknown was preferable to presenting no psychiatric testimony. Precisely because [the petitioner's] background was susceptible to leverage as a result of abuse, poverty, drugs, or other factors, [the petitioner] needed someone who could nevertheless put together the pieces to demonstrate, as [the expert] did, that [the petitioner] was not entirely a creature of his own making, that he had psychological problems, and that hope existed for some type of rehabilitation.

Davis, 333 F.3d at 1001.

In the present case, as explained above, Petitioner needed to introduce his statement to Ms. Gaines about the telephone call to attack the significant force of the prosecution's evidence of Petitioner fleeing California. Such defense evidence would not come from any other source. Also, the risks

posed by the admission of the evidence and the waiver of the confidential marital communications privilege were softened by the fact that the confession was made to Ms. Gaines rather than to law enforcement, the defense had substantial impeachment evidence regarding Ms. Gaines, and the defense had the opportunity to advance a reasonable argument that the waiver should have been limited in scope. Moreover, the court of appeal found that the jury deadlock was attributable to Meyers' decision in asking Petitioner the question that resulted in the waiver of the privilege.

Not only does the record show that Meyers' conduct was reasonable on its own, but the finding of reasonableness is further supported by the fact that counsel's conduct is entitled to a high amount of deference and should be viewed under a very forgiving standard of review. *Yarborough*, 124 S. Ct. at 4; *Strickland*, 466 U.S. at 689; *Delgado*, 223 F.3d at 981; *LaGrand*, 133 F.3d at 1271; *Bonin*, 59 F.3d at 833. Consequently, the District Court erred in finding that Meyers' conduct fell outside the wide range of reasonable professional assistance and was unreasonable.

E. The Court Of Appeal On Direct Appeal Recognized That Meyer's Conduct In Waiving The Confidential Marital Communications Privilege Was Beneficial Rather Than Prejudicial

Even if Meyers' conduct was unreasonable, Petitioner is not entitled to federal habeas relief for his claim of ineffective assistance of counsel unless he was prejudiced by the error. Prejudice requires that the petitioner prove that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Bonin*, 59 F.3d at 833; *see Strickland*, 466 U.S. at 687. The District Court's third error in this case was in finding that Meyers' conduct that resulted in the waiver of the confidential marital communications privilege was prejudicial. The District Court found "highly persuasive" the second trial court's observations that the admission of Petitioner's confession was prejudicial. (RER at 1981-82.) However, the District Court erroneously found that the court of appeal did not address the prejudice element on direct appeal. (RER at 1981.)

As explained above, the court of appeal's opinion regarding Petitioner's claim of ineffective assistance reflects that despite the reservations expressed about prejudice by the second trial court, Petitioner's testimony regarding the confidential marital communications was a cause of the jury to deadlock in the first trial. (RER at 1897 ("In view of the strong evidence against

[Petitioner], [Meyers] could reasonably have decided to introduce [Petitioner's] testimony regarding his version of the conversation he had with [Ms.] Gaines on the night of [the murder]. In fact, as previously noted, the first jury deadlocked on the murder charge.").)

In addition, the same flawed cost-benefit analysis employed by the District Court to find that Meyers' conduct was not reasonable was also employed in finding that Petitioner suffered prejudice. The District Court considered the prosecution's evidence "fairly strong, but not overwhelming." (RER at 1988.) However, in support of this evaluation of the prosecution's evidence, the District Court only identified the facts that there was no physical evidence connecting Petitioner to the murder and no percipient witness to the shooting. (RER at 1979-80.) As explained above, there was significant and substantial evidence of Petitioner's motive to kill Mr. Thomas, his threats against Mr. Melton, his connection to the murder weapon and the scene of the murder, and his fleeing California shortly after the murder.

The District Court overemphasized the confession evidence as "the strongest single piece of evidence of his guilt." (RER at 1980.) As explained above, Petitioner's confession was made to Ms. Gaines, who the defense pointed out had credibility problems of her own. In fact the impeachment evidence was

even stronger at the second trial. Evidence was produced that Ms. Gaines first told the police that Petitioner told her that he did not kill Mr. Thomas. (RER at 1649.) Ms. Gaines also told the police that Petitioner did not kill anyone. (RER at 1650.)

Moreover, in conducting the prejudice analysis, the District Court failed to address whether there was a reasonable probability Petitioner would have obtained a more favorable outcome at trial had his own testimony about his confidential marital communications been excluded. Petitioner's claimed that Meyers' error was in waiving the confidential marital communications privilege. Had the privilege been preserved entirely, as is Petitioner's apparent desire, he would not have been allowed to testify that he told his wife that she also was in danger, thus providing the reason why she would flee California and her family, with only a few of her belongings, against her wishes, and without having made any prior plan to do so. The prosecution's case was strongly supported by the evidence of Petitioner's flight, along with the strong motive evidence, the evidence connecting Petitioner to the murder weapon and the murder scene, the evidence of his threats to Mr. Thomas and Mr. Melton, and his bizarre behavior in scrubbing his hands with laundry detergent on the night of the murder. Petitioner had very little defense to present to rebut the flight evidence, and his

defense would have been even weaker had he not been able to provide the context for why Ms. Gaines would accompany him to Florida and Detroit. Therefore, the District Court erroneously found that Meyers' conduct in asking Petitioner questions which resulted in the waiver of the confidential marital communications privilege resulted in prejudice to Petitioner.

F. Conclusion

As explained above, the record shows that the state court properly found that Meyers made a tactical decision to ask Petitioner a question during the first trial which resulted in the waiver of the confidential marital communications privilege, that tactical decision was reasonable, and even if error occurred, Petitioner would not have obtained a more favorable result had the privilege been preserved. The District Court erroneously failed to give deference to the state court's finding that Meyers' conduct was a tactical decision, and erroneously found that he rendered ineffective assistance of counsel. Accordingly, the state court's rejection of Petitioner's ineffective assistance claim was not contrary to, or an unreasonable application of, *Strickland v. Washington.* Petitioner is not entitled to federal habeas relief for his ineffective assistance claim.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Court reverse the judgment of the District Court and order that the District Court deny the Petition with prejudice.

Dated: November 18, 2004

Respectfully submitted,

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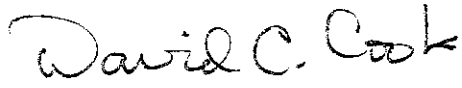

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KRISTOPHER C. EDWARDS, Petitioner-Appellee v. A.A. LAMARQUE, Warden Respondent-Appellant	CA # 04-55752 DC # CV-01-10401

APPELLEE'S OPPOSITION TO PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE R. GARY KLAUSNER
United States District Judge

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I. INTRODUCTION

Appellee Kristopher C. Edwards respectfully submits this opposition to the state's petition for rehearing with suggestion for rehearing *en banc*. Because the panel majority correctly applied well-established precedent, the petition should be denied.

II. SUMMARY OF APPELLANT'S CONTENTIONS

Appellant identified no case conflicts in the introductory statement to the petition. He stated that the case presents the following question of exceptional importance: "[W]hether 28 U.S.C. § 2254 allows a federal habeas corpus to reject the presumption of correctness for state-court fact-finding, and condemn a state-court adjudication as an unreasonable determination of the facts, where a rational fact-finder could have determined the facts as the state court did." (Pet. at 1-2.)[1]

Raising an argument not presented to the panel, appellant now urges a holding that the "unreasonable determination" standard of 2254(d)(2) is identical to the "*any* rational trier of fact" standard set down in *Jackson v. Virginia*, 443 U.S. 307 (1979) for determining whether a conviction on weak evidence denies due process of law. Additionally, in a

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[1] Pet=Appellant's Petition for Rehearing and En Banc Review; AOB=Appellant's Opening Brief; Slip Op.=The Panel Opinion; RER=Appellant's Revised Excerpts of Record; SER=Appellee's Supplemental Excerpts of Record

Rule 28(j) letter, appellant directed the Court to the recently decided U.S. Supreme Court case *Rice v. Collins*, 126 S.Ct. 969 (2006). Appellant argues that *Rice* supports his position that federal courts should defer to state court credibility determinations.

Appellant has focused his legal arguments on the ineffectiveness prong of the inquiry required by *Strickland v. Washington*, 466 U.S. 668 (1984). He has not challenged the panel majority's holding that trial counsel Meyers's ineffective assistance was prejudicial.

III. SUMMARY OF STATE COURT RULINGS

Speaking generally, appellant urges deference to the fact that "the state courts" found that trial counsel made "a tactical decision." Proper consideration of the issue requires that the state court proceedings on both the ineffective assistance question and the privilege waiver itself be set out with greater specificity.

At petitioner's first trial, the court found that trial counsel had waived the confidential marital privilege.

> "I find that the defendant has testified about conversations that he had with his wife and he has portrayed them in certain light that there were threats, that he was simply cleaning up after the dog, and that she went to her brother's house because she didn't like Don and he didn't want her there. And I believe under the law, he can't pick and choose those conversations he wants to talk

> about and then assert the privilege as to her version of those conversations, and that there is no longer expectation of privacy once he testifies about conversations he's had with her which are different than her version of the conversations. So I'm going to make a finding the privilege has been waived, and I will allow her to testify as to those limited areas that the people have mentioned." (RER 735.)

Trial counsel then observed that the record now contained a significant appellate issue regarding ineffective assistance of counsel. (RER 736.) He denied having made a tactical decision and insisted that he had made "a mistake." (RER 736.) The trial court disagreed.

> "I don't think it's inadequate representation. He chose to take the stand and he wanted to tell his version. And the only way he can tell his version is to tell it as he has told it. And I think it's a tactical decision. Maybe you didn't anticipate that it was breaching the privilege, but . . . I don't see it as ineffective assistance." (RER 736.)

Prior to the second trial, the court granted appellee's motion to have Meyers relieved as his counsel. (RER 927-30, SER 10.) To avoid having appellee's confession admitted, new counsel revisited the waiver issue. He argued that any waiver that occurred on July 18, the night after the murder, should not extend to allow introduction of Appellee's alleged admissions on July 17, the night of the murder. (RER 140.) Alternatively,

he argued that Meyers had rendered ineffective assistance of counsel. (RER 140-41, 144-45.)

The prosecutor, relying on *People v. Worthington*, 38 Cal. App. 3d 359 (1974), contended that the fact that the alleged conversations supposedly took place on different dates was immaterial.

> "[T]he defendant cannot make up a conversation and select the date it supposedly happened to distinguish it from the actual conversation and its contents. If he had indeed admitted the killing on the 17th as Gaines asserts, his statement asserting his lack of involvement on the 18th is incongruous." (RER 124-6.)

To the same effect, the prosecutor cited cases and treatises on privilege waiver in general, all for the proposition that a party cannot disclose self-serving communications and shield harmful communications from disclosure by invoking a privilege. (RER 127.)

The trial court ruled that a waiver had occurred and would be binding in the retrial. (RER 979-80.) It declined to find ineffective assistance.

> "Now, I have seen cases where the privilege was raised and during the course of the trial, counsel decides to open it up as a tactical decision. Meyers says, no, it wasn't a tactical decision here. . . . Now, maybe he did make a mistake. Maybe he made a mistake in thinking that he could limit the scope of the—of the waiver. But at this point in

time, I'm not in a position to say it was inadequacy of counsel." (RER 979.)

After appellee's wife testified at the retrial, new counsel moved for a mistrial. The trial court denied the motion.

> "Being aware of [what the court considered a waiver], counsel chose to get as close as he could hoping not to cross the line. He got a couple of warnings and as you say the last time he simply crossed the line. I can't view that as anything else but a tactical decision by the attorney to put on the case as he sees fit trying to cross the line, and he made a tactical mistake in my opinion." (RER 1119.)

After Appellee was convicted, new counsel filed a motion for new trial. (RER 216.) The trial court denied the motion.

> "[W]hat he thought he could do was come very close to that issue and limit what would come in even if he opened it up. And that to me is trial tactics. I mean he knew the privilege was there. It wasn't inadvertence or mistake knowing the privilege was there. He just thought he could skirt it and not open it up. He was trying to get as close as he could without opening up that area. And I think that's a tactical decision." (RER 1736.)

The Court of Appeal affirmed the judgment. Citing *Worthington*, it held that appellant had waived the privilege when he testified that he told Gaines that he was cleaning up after the dog.

> "In *People v. Worthington* (1974) 38 Cal. App. 3d 359, the defendant had told the police that his wife had killed two people, and the defendant related a

> detailed description that he claimed his wife had made regarding how the killings took place. The description was virtually identical to a description by the defendant's wife to the police regarding a confession she asserted the defendant had made to her. The Court of Appeal held that, by relating to the police his version of his conversation with his wife about the killings, the defendant waived the confidential marital communication privilege as to that conversation. (*Id.* at pp. 365-366.) Similarly, in the present case, by testifying that he told his wife that the puppy had urinated or defecated on the living room floor, a statement appellant claimed he made in response to Gaines's question why he was washing his hands, appellant waived the confidential marital communication privilege as to Gaines's version of appellant's statements on the night of July 17 following her inquiry why he was washing his hands." (RER 1896-97.)

The Court of Appeal also held that Meyers did not render ineffective assistance of counsel. It took a different view of the issue than the trial court did. Ignoring the evidence in the record and the findings of both trial courts that Meyers did not intend to waive the privilege, the Court of Appeal held that Meyers "could reasonably have decided" to waive the marital privilege in order to allow Appellee to testify about his version of the marital conversation that occurred on the night of the murder. (RER 1897.)

IV. ARGUMENT

A. The Law on Ineffective Assistance Claims

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to assistance of counsel. To establish ineffective assistance, a defendant must show (1) that counsel's performance "fell below an objective standard of reasonableness[.]" *Strickland v. Washington*, 466 U.S. 666, 688, 694 (1984). Challenges are "not limited to counsel's performance as a whole—*specific errors and omissions* may be the focus of a claim of ineffective assistance as well." *United States v. Cronic*, 104 S.Ct. 2039, 2046 n.20 (1984) (emphasis added). If a single negligent act prejudiced the defendant, relief must be granted.

The fact that an attorney takes an action intending to help rather than harm the client does not mean that he or she is making a "tactical decision" entitled to deference under *Strickland*. "[T]he label 'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." *Kellogg v. Scurr* 741 F.2d 1099, 1102 (8th Cir. 1984). Counsel must make "all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, *supra*, 466 U.S. at 690.

Ignorance of the law is an example of uninformed decision-making, and it is grounds for relief under *Strickland.* The U.S. Supreme Court held that counsel was ineffective when:

> "[t]hey failed to conduct an investigation that would have uncovered extensive records graphically describing [defendant's] nightmarish childhood, *not because of any strategic calculation but because they incorrectly thought that state law barred access to such records.*" *Williams v. Taylor*, 529 U.S. 362, 395 (2000) emphasis added.

This Court has also granted relief due to ineffective assistance of counsel where "[c]ounsel's errors . . . were the result of a misunderstanding of the law." *United States v. Span*, 75 F.3d 1383, 1390 (9th Cir. 1996.)

Strategic decisions must also be assessed for substantive reasonableness. In *Williams*, an AEDPA case, "the failure to introduce the comparatively voluminous amount of evidence that did speak in Williams' favor was not justified by a tactical decision to focus on Williams' voluntary confession." *Williams v. Taylor*, 529 U.S. at 396. In *Berryman v. Morton*, 100 F.3d 1089 (3rd Cir. 1996), counsel's tactical decision to open the door to damaging testimony from a police detective that linked the defendant to a separate robbery/homicide investigation was "foolhardy" and constituted a "striking instance of ineffective assistance of counsel" warranting relief under pre- and post-AEDPA standards. *Id.* at pp. 1100, 1105.

B. *Jackson v. Virginia* Is Not The Standard For Determinations Under 28 U.S.C. 2254(d)(2).

Due process requires the prosecution to prove each element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). A defendant is denied due process if he is convicted of a crime without substantial evidence having been introduced to support the charge. *Jackson v. Virginia,* 443 U.S. 307 (1979). The reviewing court must ask, "after viewing the evidence in the light most favorable to the prosecution, [whether] *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Id.*, emphasis in original.)

Citing no Supreme Court authority, appellant argues that the *Jackson* standard should be applied to determinations under 28 U.S.C. section 2254(d)(2). According to appellant, relief should not be granted under that section unless no reasonable court would have reached the same conclusion.[2] The relevant Supreme Court precedent does not support appellant's position. In *Williams v. Taylor*, 529 U.S. 362 (2000), four justices joined Justice O'Connor's opinion explicating the "unreasonable application" standard under 28 U.S.C. § 2254(d)(1). The Court held that an

[2] Appellant did not discuss *Jackson* or advance this argument below, either in his opening brief or in his reply after appellee had discussed his entitlement to relief under section 2254(d)(2). Clearly, the panel majority did not overlook or misapprehend an argument that was not presented to it.

"unreasonable application" of controlling law is one that is objectively unreasonable. (*Id.* at p. 409.)

The court did not define "unreasonableness" further. However, it specifically rejected the argument that the "unreasonable application" label was limited to conclusions that "no reasonable jurist" would reach. (*Id.* at pp. 409-10.) Presumably, the Court would interpret "unreasonable" under section 2254(d)(2) the same way it did under section 2254(d)(1).[3]

C. <u>The Panel Majority Correctly Decided The Issue</u>.

Ultimately, appellant's question need not be resolved because the premise of the question fails. There is no evidence, substantial or otherwise, that Meyers rendered effective assistance in handling the marital privilege issue.[4]

As the panel majority noted, Meyers did not understand the law of marital privilege, he did not seek *in limine* rulings to confirm what would and would not waive the privilege, he cited no authorities to defend his actions when they blew up on him, he was not aware of the leading case on

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[3] The panel majority held that Meyers' ineffective assistance was so compelling that appellee was entitled to relief whether the issue was looked at under section 2254(d)(1) or (d)(2). (Slip Op. at 16159.)

[4] "AEDPA does not require petitioner to prove that a decision is objectively unreasonable [under § 2254(d)(2)] by clear and convincing evidence. The clear and convincing evidence standard is found in § 2254(e)(1), but that subsection pertains only to state-court determinations of factual issues, rather than decisions." *Miller-El v. Cockrell*, 537 U.S. 322, 342 (2003)

the subject, and he did not bother to read it when it was presented to him. (Slip Op. 16158-16161.)[5] Meyers clearly was ignorant of the applicable law and did nothing to educate himself. Even if he knew the law, the decision to consciously waive the privilege and allow in appellee's alleged confession to murder was "foolhardy" and a "striking instance of ineffective assistance of counsel[.]" *Berryman v. Morton*, 100 F.3d 1089, 1100, 1105 (3rd Cir. 1996). That appellant has not bothered to challenge the panel's majority's conclusion on prejudice only confirms that the game was not worth the cost. The panel majority correctly applied AEDPA in concluding that Meyers did not make a constitutionally reasonable, informed tactical decision.

Citing the dissent, appellant argues that Meyers was taking a reasonable "calculated risk" that his line of questioning would not result in

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[5] Privilege law aside, Meyers did not understand basic principles of relevance. Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence." Section 356 prevents "the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." *People v. Arias*, 13 Cal. 4th 92, 156 (1996). "In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry." *People v. Zapien*, 4 Cal. 4th 929, 953 (1993) *quoting People v. Hamilton*, 48 Cal. 3d 1141, 1174 (1989).

the admission of a confession to murder.[6] There are several problems with this position. First, it improperly focuses on Meyers's questioning about the phone call on July 18 to the exclusion of his asking appellee about having cleaned up after the dogs on July 17, the night of the murder. Both the state court of appeal and the first trial court found that the question about the dogs waived the privilege. The fact that the prosecutor elected to raise the waiver issue immediately after the question about the phone call as opposed to right before her rebuttal case is of no consequence.

There was not, nor can there be, any talk of calculated risk or skirting the issue in connection with Meyers's question to appellee about the dogs. Indeed, as the panel majority aptly notes, had the prosecutor not very charitably objected when Meyers asked appellee's wife on cross-examination what appellee had told her about the dogs on July 17, he would have elicited the evidence of the confession right then before appellee ever took the stand. (Slip Op. at 16160, n. 3.)

Second, even if Meyers's questioning about the phone call triggered the waiver, the incompetence is still clear. The dissent is incorrect

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[6] Here appellant is adopting the position of the second trial court that Meyers did not intend to waive the privilege that would have prevented the admission of a confession to murder but only to risk waiving it. The first trial court found that Meyers did not intend to waive the privilege or risk waiving it. The Court of Appeal held that Meyers intended to waive the privilege.

that counsel's competence is demonstrated by the fact that he tried to distinguish the controlling *Worthington* case on the basis that this case involved two separate conversations about two different subjects.[7] There might have been two conversations, which is not a relevant distinction, but there was only one subject for purposes of the trial—appellee's connection or lack thereof to the murder that was committed on July 17. As the prosecutor correctly argued and the trial court correctly ruled, trial counsel could not introduce exculpatory confidential communications (that the prosecutor argued did not occur) and then prevent the prosecutor from responding in kind.

Third, to the extent that the concept of "calculated risk" is based on Meyers's understanding of the law of marital privilege, it is flawed because Meyers did not know how to do the math. He had not read the *Worthington* case and he took conflicting positions on the confidentiality of the conversation about the threatening phone call, arguing prior to trial that it was a confidential communication (RER 307) and arguing that it was not once it appeared that he had waived the privilege. (RER 724.) There was

[7] As the panel majority notes, Meyers had not been aware of *Worthington* so he could not have shaped his questions with an eye towards avoiding waiver under that case. (Slip.Op. at 16161-62, n. 4.)

nothing "calculated" about what Meyers did. He just rolled the dice. It is not even clear that he knew he was rolling them.[8]

Discussion of "calculated risks" may be appropriate where some areas of trial counsel's performance are concerned. However, there are other areas in which the adverse consequences are so clear that no risk is permitted. For example, the importance of presenting mitigating evidence at the penalty phase of a capital trial is so well established, that counsel may not forego a thorough mitigation investigation because he believes he will do just as well emphasizing other themes such as lingering doubt. *Wiggins v. Smith*, 539 U.S. 510, 535 (2003). Where matters of evidence are concerned, it is inappropriate to countenance the taking of *any* risk, particularly where the adverse consequence is admission of a confession that would otherwise have been excluded. As the panel majority noted, citing the California Court of Appeal stated in *People v. Dorsey*, 46 Cal. App. 3d 706 (1975), "The claims should have been asserted and ruled upon *in camera*." *Id.* at p. 719. (Slip Op. at 16102-16103.)

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[8] The panel majority recognized that Meyers was repeatedly at sea during the trial about a number of other rules of evidence, often requiring the assistance of the trial judge. These episodes "reinforce the picture of Meyers as an incompetent trial attorney." (Slip Op. at 16162, n.6.)

D. *Rice v. Collins* Has No Application Here

In *Rice v. Collins*, 126 S.Ct. 969 (2006), the defendant argued pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) that the prosecutor had violated his constitutional rights by using a peremptory challenge to strike a young African-American woman on the basis of her race. *Id.* at p. 972. The trial court had required the prosecutor to articulate a race-neutral reason for the challenge. The prosecutor replied that the juror was young, a woman, lacked ties to the community and had rolled her eyes in response to a question by the court (a gesture the court had not seen). *Id.* at p. 973.

The trial court denied Collins's motion. Ultimately, a divided panel of this Court granted habeas relief under 28 U.S.C. § 2254(d)(2), "holding that it was unreasonable to accept the prosecutor's explanation that Juror 16 was excused on account of her youth and her demeanor." *Id.* at p. 974. The U.S. Supreme Court reversed, holding that on the trial court record, it was not unreasonable for the trial court to believe the prosecutor's statement that she struck the juror for race-neutral reasons. *Id.* at pp. 974-76.

Rice has no application here because Meyers's motive, secret intent and, ultimately, his credibility, were not at issue. As the panel majority recognized, Meyers characterization of his own conduct as a mistake does not control. (Slip Op. at 16162.) Appellant would be the first

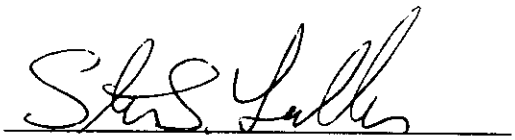
to argue that the mere fact that trial counsel "falls on his sword" does not entitle a defendant to relief for ineffective assistance.

If, as appellant would have it, "I made a mistake" was a lie,[9] one must ask what secret truth Meyers was concealing. The trial courts appeared to believe that the opposite of "I made a mistake" is "I did what I did intentionally, trying to help my client." Clearly, he did, but that does not make what he did competent or constitutional. Appellant believes that the opposite of "I made a mistake," is "I made a constitutionally reasonable decision after diligent investigation of the relevant facts and law." Whether or not counsel renders effective assistance must be determined based on the evidence of what counsel did or did not do. The objective record here undeniably answers that question in appellee's favor. *Rice* is irrelevant.

V. CONCLUSION

For the foregoing reasons, the petition should be denied in its entirety.

Dated: March 23, 2006



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[9] As their rulings reveal, when all is said and done, both trial courts actually agreed that Meyers had made a mistake. (RER 736, 979, 1119, 1736.)

CERTIFICATE OF COMPLIANCE
Edwards v. Lamarque, 04-55752

Pursuant to Ninth Circuit Rules 35-4 and 40-1, I hereby certify that appellee's opposition to appellant's petition for rehearing with suggestion for rehearing *en banc* is produced in a proportional font (Times New Roman) of 14 point type and utilizes double line spacing, except in footnotes and extended quotations, which are single-spaced. I further certify that, according to the word count of the word processing system used to prepare the brief, the brief includes 3,756 words (exclusive of the table of contents, the table of authorities, the proof of service and this certificate).

Dated: March 23, 2006

STEVEN S. LUBLINER
Attorney for Appellee
Kristopher C. Edwards

PROOF OF SERVICE

I, Steven S. Lubliner, certify and declare under penalty of perjury that I: am a citizen of the United States; am over the age of 18 years; am in practice at the address indicated; am a member of the State Bar of California and the Bar of this Court; am not a party to or interested in the cause entitled upon the document to which this Proof of Service is affixed; and that I served a true and correct copy of the following document(s) in the manner indicated below:

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(X) by today depositing, at Petaluma, California, the said document(s) in the United States mail in a sealed envelope, with first-class postage thereon fully prepaid (and/or):

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Executed in Petaluma, California on March 23, 2006.